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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

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7 U.S. EQUAL EMPLOYMENT
8 OPPORTUNITY COMMISSION,

Case No. 2:16-cv-02187-RFB-PAL

ORDER

9 Plaintiff,

10 v.

11 WYNN LAS VEGAS, LLC,
12 Defendant.
13

14
15 **I. INTRODUCTION**

16 Before this Court are Defendant Wynn Las Vegas (“Defendant”)’s Motion for Summary
17 Judgment (ECF No. 26) and Plaintiff U.S. Equal Employment Opportunity Commission (“EEOC”
18 or “Plaintiff”)’s Partial Motion for Summary Judgment (ECF No. 27). For the reasons stated
19 below, both Motions are denied.

20
21 **II. BACKGROUND**

22 On September 16, 2016, Plaintiff filed its Complaint with Jury Demand against Defendant.
23 (ECF No. 1). Plaintiff asserts the following causes of action: (1) failure to provide a reasonable
24 accommodation in violation of the Americans with Disabilities Act (“ADA”); (2) failure to engage
25 in the interactive process in violation of the ADA; and (3) retaliation in violation of the ADA.
26 Defendant filed its Answer on November 14, 2016. (ECF No. 5).

27 The parties filed their respective Motions for Summary Judgment on September 22, 2017.
28 (ECF Nos. 26, 27). Responses were filed on October 27, 2017. (ECF Nos. 28, 29). Plaintiff filed
an Errata to its Response on November 8, 2017. (ECF No. 30). On November 9, 2017, Defendant

1 filed its Reply. (ECF No. 31). On November 10, 2017, Plaintiff filed its Reply. (ECF No. 32). The
2 Court held a hearing on the matter on July 9, 2018, and took the matter under submission.

3 4 **III. LEGAL STANDARD**

5 **A. Motion for Summary Judgment**

6 Summary judgment is appropriate when the pleadings, depositions, answers to
7 interrogatories, and admissions on file, together with the affidavits, if any, show “that there is no
8 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
9 Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering
10 the propriety of summary judgment, the court views all facts and draws all inferences in the light
11 most favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir.
12 2014). If the movant has carried its burden, the non-moving party “must do more than simply show
13 that there is some metaphysical doubt as to the material facts Where the record taken as a
14 whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
15 issue for trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (quotation marks
16 omitted).

17 18 **IV. FACTUAL FINDINGS**

19 **A. Undisputed Facts**

20 The Court finds that the following facts are undisputed. Plaintiff brings this suit on behalf
21 of Soloman Hussey (“Hussey”), a United States Army veteran who served in the Iraq War. Hussey
22 is a former employee of Defendant. Hussey was diagnosed with Post Traumatic Stress Disorder
23 (“PTSD”) after his military service. He first received treatment by the United States Department
24 of Veterans Affairs Southern Nevada Healthcare System (“VA”) in December 2008.

25 Defendant is a major casino resort in Las Vegas, Nevada. Defendant hired Hussey in
26 February 2007 as a full-time security officer. At the time of his employment, Hussey received a
27 Job Summary for his security officer position and signed it, representing to Defendant that he was
28 capable of performing the position’s essential functions. Later in 2007, Hussey became a bike

1 security officer. The bike security officer position is different from a regular security officer in that
2 a bike security officer receives additional training on riding and maneuvering a bike, and is
3 required to patrol the exterior of Defendant's resort property. The training for this position is two
4 or three days long. As a bike officer, Hussey was responsible for patrolling and monitoring his
5 assigned areas to provide a safe environment for Defendant's guests and employees. Hussey's job
6 involved responding to emergency situations as needed. As a bike security officer, Hussey was
7 required to be physically present at work, inasmuch as he could not perform any of his job duties
8 if he was absent from work.

9 Hussey performed his job as a bike security officer for Defendant without incident
10 throughout 2007, 2008, 2009 and the first half of 2010. During his employment, he performed
11 satisfactorily and was never counseled or disciplined for any attendance or performance problems.
12 Hussey never shared his PTSD diagnosis with any management official at Defendant until the
13 summer of 2010. That summer, Hussey started experiencing problems with the medication he was
14 taking for his PTSD. As a result, Hussey spoke with his then-Shift Manager, Tammy Rogers
15 ("Rogers"), in early August 2010, telling her he had PTSD and informing her that he might need
16 to take some leave. At that time, Hussey described his working relationship with Rogers as "real
17 good." Rogers had never issued any disciplinary action to Hussey throughout his entire
18 employment with Defendant. In response to Hussey's disclosure of his PTSD, Rogers advised him
19 to fill out paperwork for Family and Medical Leave Act ("FMLA") leave so that leave would cover
20 whatever he needed for his condition.

21 Defendant provided Hussey with FMLA medical certification forms on August 3, 2010 to
22 be completed by his health care provider and returned by August 18, 2010. Hussey gave the forms
23 to Mildred L. Martin, RN ("Nurse Martin"), a nurse practitioner at the VA who was then treating
24 Hussey for his PTSD. At that time, Nurse Martin did not complete the medical certification form,
25 and instead gave Hussey a letter dated August 24, 2010 to provide to his employer. In late August
26 2010, Hussey furnished that letter to Defendant. In her letter, Nurse Martin made the following
27 recommendations for Hussey: "It is recommended that he be permitted to change duties and times
28 to a less stressful situation when needed. It is advised that he may need time to make adjustments

1 in an environment that is quieter that allows for time to rest and readjust. She concluded in the
2 letter: "Therefore, I am requesting that this worthy veteran's needs be considered when he reports
3 to supervisors that his anxiety and his inability to stay focused is increasing and he may need to
4 leave work before he loses control in specific situations." Between late August and October 2010
5 Hussey did report to Rogers on one or two occasions that his anxiety was increasing. Hussey
6 admits that when he reported his increased anxiety to Rogers, he told Rogers he needed to step
7 away from his duties. In response, Rogers said, "Okay."

8 Defendant issued a new certification form to Hussey on August 31, 2010 and requested its
9 completion and return by September 15, 2010. This time, Nurse Martin did complete the medical
10 certification form, which she signed and dated September 8, 2010. In her certification, Nurse
11 Martin stated that when Hussey's PTSD symptoms arose, she suggested that his employer allow
12 him an opportunity "to deescalate in certain times during his work hours [because that] is what he
13 deserves and needs" When asked in the medical certification whether Hussey's condition
14 would cause episodic flare-ups that would prevent him from performing his job functions, Nurse
15 Martin stated: "PTSD symptoms often present, negative behavior therefore leaving [sic] for short
16 times and/or changing hours are important." At the conclusion of the certification, Nurse Martin
17 was asked in Question 7(d) to estimate the "frequency of flare-ups and the duration of related
18 incapacity" Hussey may have over the next 12 months. In response, Nurse Martin wrote, "NA.
19 Not a concrete time span or limit can be predicted."

20 Hussey provided the medical certification form to Defendant around September 11, 2010.
21 Upon receipt of the medical certification form, Defendant's Employee Relations Department noted
22 that Question 7(d) pertaining to frequency and duration of flare-ups had not been completed. Thus,
23 Defendant advised Hussey that his certification was deficient, and that his health care provider
24 needed to complete Question 7(d). Defendant then gave Hussey until September 26, 2010 to return
25 the updated certification. Hussey did not provide an updated or additional medical certification
26 form to Defendant from Nurse Martin or any other health care provider.

27 Concurrent with Hussey's initial disclosure of his PTSD to Rogers in early August 2010,
28 Defendant's Security Department was then experiencing a staffing shortage among its security

1 officers. Due to the staffing shortage, Security management imposed a requirement in the summer
2 of 2010 for all security officers to work mandatory overtime, which included having officers work
3 on their regularly scheduled days off. Defendant's then-Executive Director of Security, Marty
4 Lehtinen ("Lehtinen"), addressed the situation in a memorandum dated August 2, 2010, and
5 explained that Defendant was in the process of hiring approximately 53 additional security
6 officers. As of August 2010, Defendant had a total of six (6) bike officers working on the graveyard
7 shift, including Hussey. While bike officers did require some additional training, nothing
8 prevented other security officers from being so trained if they so desired and were permitted to do
9 so by Defendant.

10 Prior to the mandatory overtime directive to all security officers, Hussey had a regular work
11 schedule as a bike security officer from 12:00 a.m. until 8:00 a.m. on the graveyard shift. He
12 worked Monday through Friday, and had Saturdays and Sundays as his regular days off. Between
13 August 24, 2010, the date of Nurse Martin's initial letter, and October 10, 2010, Hussey worked a
14 total of 13 extra days in addition to his regular 5-day work schedule. These extra days primarily
15 consisted of Hussey working on Saturdays and Sundays, what would have been his regular days
16 off. Hussey received overtime pay for the additional time worked.

17 After the September 26, 2010 deadline passed and Hussey had not furnished any updated
18 medical certification, then-Employee Relations Counselor Luz Cruz-Vitaro ("Cruz-Vitaro")
19 requested a meeting to speak with Hussey. On September 29, 2010, Hussey met with Cruz-Vitaro
20 and Rogers. During that meeting, Hussey stated that he did not want to change shifts from the
21 graveyard. Instead, Hussey said that he needed intermittent FMLA leave. The same day, Hussey
22 confirmed his request for intermittent leave in a written statement. In that statement, he indicated
23 that he did not want to change his work shift. Defendant denied Hussey's request for FMLA
24 intermittent leave on September 30, 2010 and so advised Hussey. He was not asked if he would
25 like an accommodation for intermittent leave. Defendant did reach out directly to Nurse Martin
26 to ask again if she would provide an estimate on the frequency and duration issue. Nurse Martin
27 did not respond.

1 Hussey continued to work until October 19, 2010, which would ultimately be the last date
2 he physically appeared for a shift. On that same day, Nurse Martin provided a second letter for
3 Hussey, this time requesting that he be given one (1) week off duty to make an adjustment to his
4 medication because of increased anxiety and near panic attacks. Hussey submitted a vacation leave
5 request for the one (1) week, which Rogers approved. Hussey's vacation leave was approved
6 through October 26, 2010, with him expected back at work on October 27. Hussey, however, did
7 not return to work, and instead called out for October 27, 28 and 29.

8 On October 27, 2010, Defendant notified Hussey that it would deny his request for FMLA
9 intermittent leave due to deficiencies in the medical certification form. Near that time, Hussey
10 submitted to Defendant a note handwritten by Nurse Martin and dated October 28, 2010 which
11 stated, "Soloman Hussey 8713 can return to work without restrictions on 11.13-10." Following
12 receipt of Nurse Martin's handwritten note of October 28, 2010, Defendant again reached out to
13 Hussey. On November 2, 2010, Cruz-Vitaro spoke with Hussey by telephone and discussed the
14 need for FMLA medical certifications to be completed for his intermittent leave request and his
15 continuous leave request (from October 27 through November 12, 2010). By e-mail of that same
16 date, Defendant provided Hussey with two (2) FMLA medical certification forms to be completed
17 and returned by November 16, 2010. Defendant also sent an Acknowledgment for Hussey to sign,
18 confirming he had received the subject forms. Hussey, despite having signed previous
19 Acknowledgments, refused to sign this one, claiming the date was wrong and should have been
20 dated for August 2010, when he first made his condition known. At some point in early November
21 2010, Hussey filed a Charge of Discrimination with the EEOC. The EEOC sent a notice of the
22 Charge of Discrimination to Defendant on November 4, 2010.

23 Hussey testified that on November 13, 2010 he went to Rogers' office and left a letter from
24 Nurse Martin dated November 12, 2010. The letter stated that Hussey had a recent increase of
25 anxiety of work related issues, which would require an increase in his medication. Nurse Martin
26 recommended that Hussey should be given an additional two weeks off of work with consideration
27 of working in another department within the properties.

1 On November 19, 2010, then-Director of Security Cara Welk (“Welk”), in consultation
2 with Employee Relations, placed Hussey on suspension pending investigation (“SPI”) for his
3 failure to return to work/job abandonment. An SPI is categorized in Defendant’s Attendance
4 Standards Policy as a temporary status which allows Defendant to investigate the underlying
5 circumstances of employee conduct before taking any additional action. An employee placed on
6 SPI can subsequently be: (1) returned to work with no discipline and paid for any time lost, (2)
7 returned to work with some form of discipline imposed, or (3) terminated. Ms. Welk attempted to
8 call Hussey to advise of the SPI the same day it was issued, but she was unable to reach him and
9 left a message for him to call back. Hussey never called back to speak with either Ms. Welk or
10 anyone else at Defendant for the balance of 2010.

11 Cruz-Vitaro wrote Hussey a letter dated December 6, 2010 which chronicled the events
12 occurring since August 2010. She also enclosed blank FMLA medical certification forms for him
13 to have completed and returned with 15 days, as well as a Medical Verification Form if he was
14 requesting a reasonable accommodation for disability. Cruz-Vitaro wrote that the authorization to
15 release medical information and the medical verification form must be completed before the ADA
16 interactive process could begin. Hussey did not respond to the December 6, 2010 letter.

17 On January 13, 2011, counselors from Defendant’s Employee Relations department sent a
18 letter to Hussey, requesting to meet with him. Hussey met with then-Employee Relations
19 Counselor Kathleen Bast (“Bast”) and Employee Relations Coordinator Gloria Kudla (“Kudla”)
20 on January 18, 2011. In that meeting, Bast asked if Hussey was able to return to work. He stated
21 in response that he was not sure, and would have to get back to her. In addition, Hussey claimed
22 in the January 2011 meeting that he informed Bast about leaving a note from Nurse Martin on
23 Supervisor Rogers’ desk in November 2010.

24 After the January 18, 2011 meeting, the only time Hussey spoke with anyone in Employee
25 Relations was when he tendered his resignation in February 2011. Hussey remained off work for
26 all of January and February 2011. He went to Defendant’s premises on February 28, 2011 to submit
27 his resignation.

28 **B. Disputed Fact**

1 The parties dispute when Defendant first received and reviewed the November 12, 2010
2 letter from Nurse Martin.

3 4 **V. DISCUSSION**

5 **A. Laches**

6 Laches is an equitable defense to “a party’s right to bring suit, which is derived from the
7 maxim that those who sleep on their rights, lose them.” Eat Right Foods Ltd. v. Whole Foods Mkt.,
8 Inc., 880 F.3d 1109, 1115 (9th Cir. 2018) (citation and quotation marks omitted). Whether a
9 plaintiff’s claim is barred by laches is a question of law. Miller v. Maxwell’s Intern., Inc., 991 F.2d
10 583, 585 (9th Cir. 1993). However, “[b]ecause the application of laches depends on a close
11 evaluation of all the particular facts in a case, it is seldom susceptible of resolution by summary
12 judgment.” Couveau v. Am. Airlines, Inc., 218 F.3d 1078, 1083 (9th Cir. 2000) (citation omitted).

13 In employment discrimination suits, an employer may assert the defense of laches to
14 prevent a plaintiff “from maintaining a suit if he unreasonably delays in filing a suit and as a result
15 harms the defendant.” Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121 (2002). To prevail
16 on this defense, the employer must prove two elements: (1) a lack of diligence by the plaintiff, and
17 (2) resulting prejudice to the defendant. Id. at 121-22 (citations omitted) (discussing the test in the
18 context of a Title VII hostile work environment action). Where laches is asserted as a defense, the
19 defendant employer must make a prima facie showing of prejudice; if the burden is met, the burden
20 shifts to plaintiff to show either that the employer was not actually prejudiced, or reasonable
21 diligence was exercised in the filing of the complaint. Romans v. Incline Vill. Gen. Improvement
22 Dist., 658 Fed. Appx. 304, 306 (9th Cir. 2016) (quoting United States v. Riedl, 496 F.3d 1003,
23 1008 (9th Cir. 2007)). When plaintiff offers no “viable justification” for her delay, the first element
24 of the laches test is satisfied. Id. (quoting Danjaq LLC v. Sony Corp., 263 F.3d 942, 955 (9th Cir.
25 2011)).

26 There are two forms of prejudice resulting from unreasonable delay – evidentiary and
27 evidence based. Id. at 307 (quoting Danjaq, 263 F.3d at 955)). Evidentiary prejudice may be found
28

1 where defendant alleges that evidence has been lost, or there are witnesses whose memories have
2 faded or who have died. Id.

3 Under the Equal Employment Opportunity Act of 1972, the only time limitation on the
4 right for the EEOC to bring suit is that the EEOC may not pursue litigation until at least 30 days
5 after a Notice of Charges is filed. Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 360
6 (1977). Aside from that limitation, “neither [Section] 706(f) nor any other section of the Act
7 explicitly requires the EEOC to conclude its conciliation efforts and bring an enforcement suit
8 within any maximum period of time.” Id. (analyzing EEOC suit against employer brought three
9 years and two months after the charging party first raised a complaint with the EEOC). “Unlike
10 the litigant in a private action who may first learn of the cause against him upon service of the
11 complaint, the Title VII [or ADA] defendant is alerted to the possibility of an enforcement suit
12 within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to
13 give him an opportunity to gather and preserve evidence in anticipation of a court action.” Id. at
14 372. Yet, if the evidence demonstrates that the EEOC acted with unreasonable delay, “the federal
15 courts do not lack the power to provide relief. . . . This Court has said that when a Title VII [or
16 ADA] defendant is in fact prejudiced by a private plaintiff’s unexcused conduct of a particular
17 case, the trial court may restrict or even deny backpay relief. . . . The same discretionary power to
18 locate a just result in light of the circumstances peculiar to the case . . . can also be exercised when
19 the EEOC is the plaintiff.” Id. at 373 (citations and quotation marks omitted).

20 In its Motion for Summary Judgment, Plaintiff requests summary judgment on Defendant’s
21 thirteenth affirmative defense of laches. Plaintiff contends that Defendant cannot show that it
22 suffered substantial prejudice, and that laches should not bar this suit because it was filed in the
23 public interest. Defendant argues that Plaintiff’s delay in filing the instant suit was unreasonable,
24 and that Defendant has faced evidentiary prejudice as a result.

25 The Court finds that summary judgment in Plaintiff’s favor is unwarranted, as the Court is
26 required to engage in a highly fact-intensive inquiry to determine whether laches is available to
27 bar a suit. Although the issue is to be decided by the Court, at this stage, there is insufficient
28 evidence for the Court to determine whether Plaintiff’s delay was reasonable, or whether

1 Defendant has not been substantially prejudiced. The Court finds that this case presents a
2 somewhat unique factual circumstance, in that nearly all of the decisions taken in relation to
3 Hussey's employment were documented contemporaneously. Defendant's concern that witnesses'
4 memories have faded or that witnesses are no longer in its employ may prove to be minimal given
5 the documentation produced in discovery – however, the Court finds that the final resolution of
6 this issue should be determined after trial. While it appears unlikely that Defendant will be able to
7 establish evidentiary prejudice, the issue requires further facts in the context of trial. The Court
8 therefore denies the Plaintiff's motion on this point.

9 **B. Qualifications to Perform Essential Job Functions**

10 "To state a claim of discrimination under the ADA, a plaintiff must establish that he or she
11 is a 'qualified individual.'" Rohr v. Salt River Project Agric. Imp. & Power Dist., 555 F.3d 850,
12 862 (9th Cir. 2009). According to the 2010 regulations implementing the ADA, a "[q]ualified
13 individual with a disability means an individual with a disability who satisfies the requisite skill,
14 experience, education and other job-related requirements of the employment position such
15 individual holds or desires, and who, with or without reasonable accommodation, can perform the
16 essential functions of such position." 29 C.F.R. § 1630(m) (2010). The burden of proof to show
17 that she is a qualified individual lies with the plaintiff. See Smith v. Clark Cnty. Sch. Dist., 727
18 F.3d 950, 957-58 (9th Cir. 2013) ("To prevail on her ADA claim, Smith bears the burden of
19 proving that she is a qualified individual who can perform the essential functions of a particular
20 job."); see also Bates v. United Parcel Serv., Inc., 511 F.3d 974, 990 (9th Cir. 2007) ("As the
21 plaintiff, Bates bears the burden to prove that he is 'qualified.'"). "Essential functions" are the
22 fundamental job duties of the role that an individual with a disability holds or desires. 29 C.F.R. §
23 1630(n)(1) (2010). The ADA's protections do not apply where a disabled person cannot perform
24 the essential functions of a job, even with a reasonable accommodation. Bates, 511 F.3d at 989
25 (citation omitted).

26 Plaintiff moves for summary judgment on the issue of Hussey being a qualified individual
27 under the ADA. In Plaintiff's view, the undisputed facts demonstrate that Hussey had a disability
28 between August 2010 and February 2011; the disability impairs his brain functioning such that it

1 substantially limits major life activities; and he continued to perform the essential functions of his
2 job even without an accommodation. Defendant argues that Hussey was not a qualified individual
3 because, although it is undisputed that he had a disability, the fact that his medical provider failed
4 to indicate the frequency and duration of Hussey's PTSD flare ups meant that he could become
5 incapacitated at any time and therefore would be unable to perform the essential functions of his
6 job. Defendant further contends that Hussey's requested accommodation of being able to take
7 breaks or leave when needed was unreasonable, as an essential function of his job required him to
8 be physically present at work.

9 The Court finds that there is a genuine dispute of fact as to the issue of whether Hussey
10 could perform the essential functions of the bike security officer job from the time he disclosed his
11 diagnosis to the time he resigned from Defendant's employ. The undisputed facts clearly
12 demonstrate that Hussey had PTSD as of August 2010, when he disclosed this condition to his
13 supervisor; the parties do not dispute that Hussey had a disability. However, a reasonable juror
14 could find that Hussey was not qualified to perform the essential functions of the job, which
15 required consistent in-person attendance. On the other hand, a reasonable juror could find that
16 Hussey was qualified to perform the job if he received a reasonable accommodation, such as
17 removing overtime shifts from his work schedule. Because there are disputes of fact as to the
18 provision of a reasonable accommodation, and because that inquiry is inextricably linked to the
19 issue of whether Hussey was a qualified individual, the Court finds that it cannot resolve this
20 dispute at this stage.

21 For these reasons, summary judgment is unwarranted in favor of either party.

22 **C. Engaging in the Interactive Process in Good Faith**

23 In the Ninth Circuit, employers and employees alike are required to engage in an
24 "interactive process" in making reasonable accommodations for disabled employees, as "the
25 interactive process is a mandatory rather than a permissive obligation on the part of employers
26 under the ADA" Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1114 (9th Cir. 2000), vacated on
27 other grounds by U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002). The employee need not use
28 the words "reasonable accommodation" to trigger the start of the interactive process, and in some

1 instances, an employer should automatically begin the process even when an employee has not
2 requested an accommodation where the employer “(1) knows that the employee has a disability,
3 (2) knows, or has reason to know, that the employee is experiencing workplace problems because
4 of the disability, and (3) knows, or has reason to know, that the disability prevents the employee
5 from requesting a reasonable accommodation.” Id. at 1112 (quotation marks omitted) (quoting
6 EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the
7 Americans with Disabilities Act, EEOC Compliance Manual (CCH), § 902, No. 915.002 (March
8 1, 1999), at 5459).

9 “The interactive process requires: (1) direct communication between the employer and
10 employee to explore in good faith the possible accommodations; (2) consideration of the
11 employee’s request; and (3) offering an accommodation that is reasonable and effective.” Zivkovic
12 v. S. Cal. Edison Co., 302 F.3d 1080, 1089 (9th Cir. 2002) (citation omitted). Both the employer
13 and the employee must engage in the interactive process in good faith. “[T]he employee’s
14 participation is equally important because he or she generally knows more about his or her
15 capabilities, and holds essential information for the assessment of the type of reasonable
16 accommodation which would be most effective.” Goos v. Shell Oil Co., 451 Fed. Appx. 700, 702
17 (9th Cir. 2011) (quotations omitted). As a part of the interactive process, “[e]mployers should meet
18 with the employee who requests an accommodation, request information about the condition and
19 what limitations the employee has, ask the employee what he or she specifically wants, show some
20 sign of having considered employee’s request, and offer and discuss available alternatives when
21 the request is too burdensome.” Id. at 1115 (citations omitted).

22 The Ninth Circuit has granted summary judgment for employers where employees failed
23 to engage in the interactive process. See, e.g., Dep’t of Fair Employment & Hous. v. Lucent Techs.,
24 Inc., 642 F.3d 728, 743 (9th Cir. 2011) (finding that the undisputed facts demonstrated that the
25 failure of the interactive process was caused entirely by the employee); Allen v. Pac. Bell, 348
26 F.3d 1113, 1115 (9th Cir. 2003) (“Because Allen was requested, but failed, to submit additional
27 medical evidence that would serve to modify his doctor’s prior report, Pacific Bell’s determination
28

1 . . . was appropriate. Pacific Bell did not have a duty under the ADA or California law to engage
2 in further interactive processes . . . in the absence of any such information.”).

3 The reasonableness of an accommodation, and whether it is an undue burden, is generally
4 a question of fact. Humphrey v. Mem’l Hosps. Ass’n, 239 F.3d 1128, 1137 (9th Cir. 2001)
5 (citations and quotation marks omitted). “Determining whether a proposed accommodation . . . is
6 reasonable, including whether it imposes an undue hardship on the employer, requires a fact-
7 specific, individualized inquiry. In the summary judgment context, a court should weigh the risks
8 and alternatives, including possible hardships on the employer, to determine whether a genuine
9 issue of material fact exists as to the reasonableness of the accommodation.” Nunes v. Wal-Mart
10 Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999) (finding a dispute of material fact as to whether
11 medical leave constituted a reasonable accommodation). An accommodation need only be
12 reasonable on its face. Dark v. Curry Cty., 451 F.3d 1078, 1088 (9th Cir. 2006).

13 Under the regulations implementing the ADA, the term “reasonable accommodation” is
14 defined to mean, in relevant part: “[m]odifications or adjustments to the work environment, or to
15 the manner or circumstances under which the position held or desired is customarily performed,
16 that enable a qualified individual with a disability to perform the essential functions of that
17 position[.]” 29 C.F.R. § 1630.2(o)(ii) (2010). The Ninth Circuit has held that “[a]n ineffective
18 ‘modification’ or ‘adjustment’ will not accommodate a disabled individual’s limitations.
19 Ineffective modifications therefore are not accommodations.” U.S. E.E.O.C. v. UPS Supply Chain
20 Sols., 620 F.3d 1103, 1110 (9th Cir. 2010) (quotations omitted). “Reasonable accommodations
21 may include: ‘job restructuring, part-time or modified work schedules, reassignment to a vacant
22 position, acquisition or modification of equipment or devices, appropriate adjustment or
23 modifications of examinations, training materials or policies, the provision of qualified readers or
24 interpreters, and other similar accommodations.’” Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S.
25 795, 803 (1999) (citing 42 U.S.C. § 12111(9)(B)). Notably, “[a]n employer is not obligated to
26 provide an employee the accommodation he requests or prefers, the employer need only provide
27 some reasonable accommodation.” UPS Supply Chain Sols., 620 F.3d at 1110-11 (citation
28 omitted).

1 Congress did not intend for the FMLA to modify the rights available under the ADA. 29
2 C.F.R. § 825.702(a) (2010). Even if an employee requests FMLA leave, if the employee meets the
3 definition of a “qualified individual” under the ADA, the employer is required to make reasonable
4 accommodations unless the employer would face an undue hardship. 29 C.F.R. § 825.702(b)
5 (2010).

6 Defendant argues in its Motion that it engaged in the interactive process in good faith.
7 Defendant’s position is that Hussey was responsible for the breakdown in the interactive process,
8 as he failed to complete all parts of the certification form, did not independently request any other
9 accommodation besides intermittent leave, and did not communicate with Defendant for several
10 months despite Employer Relations personnel initiating contact. Plaintiff seeks summary judgment
11 on the issue of Defendant’s failure to accommodate Hussey. Plaintiff contends that the requirement
12 to engage in the interactive process was triggered immediately when Defendant became aware of
13 Hussey’s need for accommodation in August 2010, when Rogers advised Hussey to fill out FMLA
14 forms, and also when Nurse Martin provided the August 24, 2010 letter detailing Hussey’s PTSD
15 condition; yet, Defendant only considered Hussey’s request under the FMLA. Plaintiff further
16 argues that Defendant disregarded the other suggestions for accommodation provided by Nurse
17 Martin, such that Defendant caused the breakdown in the interactive process.

18 The Court finds that there are genuine issues of fact regarding the interactive process and
19 potential reasonable accommodations that must be left to the jury. With regard to Defendant, the
20 Ninth Circuit has held that “summary judgment is available only when there is no dispute that the
21 employer has engaged in the interactive process in good faith.” Barnett, 228 F.3d at 1116. The
22 Court finds that there are disputes of fact as to whether the Defendant engaged in the interactive
23 process in good faith as the parties dispute, *inter alia*, whether Defendant’s insistence on a
24 prediction of symptom flare-ups constituted good faith.

25 Moreover, there is a dispute as to whether Hussey’s request was considered under the
26 ADA, or whether it was simply treated as an FMLA request. There is a dispute of fact as to whether
27 any of the Employee Relations representatives specifically asked Hussey about his needs and
28 limitations and what he thought potential accommodations could be, during the meetings with

1 Hussey. Although Defendant contends that it provided Hussey with ADA-related forms at a certain
2 point during his absence, there remains a triable issue for the jury as to whether a clear dialogue
3 between Defendant’s representatives and Hussey took place that fulfilled the requirements of the
4 interactive process. FMLA intermittent leave was just one potential accommodation proposed by
5 Hussey and his provider. There is a genuine dispute as to whether the interactive process took
6 place between Hussey and Defendant such that an alternative reasonable accommodation could
7 have been agreed upon – or was actually provided – in light of Defendant’s scheduling difficulties
8 and Hussey’s needs to minimize his flare ups.

9 **D. Retaliation**

10 42 U.S.C. § 12203(a) (2010) prohibits the discrimination against any individual for filing
11 a charge or participating in an investigation under the ADA. The Ninth Circuit applies the
12 McDonnell Douglas burden-shifting test to ADA retaliation claims. Curley v. City of North Las
13 Vegas, 772 F.3d 629, 632 (9th Cir. 2014) (citations omitted); see also Brown v. City of Tucson,
14 336 F.3d 1181, 1186-87 (9th Cir. 2003). To establish a prima facie case for retaliation, a plaintiff
15 must show: “(1) involvement in a protected activity, (2) an adverse employment action and (3) a
16 causal link between the two.” Brown, 336 F.3d at 1187 (citations and quotation marks omitted).
17 The burden then shifts to the employer to articulate a legitimate reason for the employment action.
18 Id. If the employer meets its burden, the Plaintiff must produce evidence that the proffered reason
19 is pretextual. Id. A showing of but-for causation is required for the “causal link” element of the
20 retaliation test. T.B. ex rel. Brenneise v. San Diego Unified School Dist., 806 F.3d 451, 473 (9th
21 Cir. 2015) (citing University of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2528 (2013)).

22 “The EEOC has interpreted ‘adverse employment action’ to mean ‘any adverse treatment
23 that is based on a retaliatory motive and is reasonably likely to deter the charging party or others
24 from engaging in protected activity.’” Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000).
25 “The EEOC test covers lateral transfers, unfavorable job references, and changes in work
26 schedules. These actions are all reasonably likely to deter employees from engaging in protected
27 activity.” Id. at 1243; see also Ramsey v. City of Philomath, 182 Fed. Appx. 678, 680 (9th Cir.

1 2006) (“Ramsey has also shown that she suffered adverse employment actions of transfer,
2 reduction in work hours, and dismissal.”).

3 Whether an adverse employment action is retaliatory is a question of fact. Ellins v. City of
4 Sierra Madre, 710 F.3d 1049, 1062 (9th Cir. 2013) (citation omitted) (applying rule in First
5 Amendment retaliation context).

6 Defendant argues that it did not retaliate against Hussey for filing the Charge of
7 Discrimination. Defendant also argues that Hussey was not assessed any attendance points,
8 contrary to what Defendant’s Attendance Standards Policy requires, and essentially received de
9 facto intermittent leave which cannot be considered an adverse action. Along those lines,
10 Defendant contends that Plaintiff cannot establish a “but for” causal link between Hussey’s
11 protected activities and the SPI, as the SPI was not disciplinary. Plaintiff counters that summary
12 judgment is unwarranted because there is a triable issue as to whether the SPI was a retaliatory
13 adverse employment action; Plaintiff argues that it has met the prima facie test and that a
14 reasonable juror could infer retaliation given the close proximity in time between the filing of the
15 Charge and the SPI. Plaintiff contends that the SPI, which resulted in unpaid leave, was
16 unnecessary when Defendant was aware of the reason for Plaintiff’s absence.

17 The Court finds that there is a genuine dispute of fact as to whether the SPI amounted to a
18 retaliatory adverse employment action. A reasonable juror could find that Plaintiff was placed on
19 the SPI because he filed the Charge of Discrimination, and the temporal proximity may suggest
20 retaliatory intent. Because the Court is not in the position of resolving factual disputes at the
21 summary judgment stage, the retaliation issue must be left to the jury.

22 **E. Punitive Damages**

23 Plaintiff requests summary judgment against Defendant’s third affirmative defense,
24 regarding the constitutionality of a claim for punitive damages. The Court interprets this defense
25 as Defendant reserving the right to challenge the evidence upon which punitive damages are based,
26 or the amount of punitive damages if awarded, under the due processes clauses of the U.S.
27 Constitution and Nevada Constitution. Because there has not yet been a determination that punitive
28 damages are warranted in this case; the Court denies the Plaintiff’s request as premature.

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VI. CONCLUSION

Accordingly,

IT IS ORDERED that Defendant's Motion for Summary Judgment (ECF No. 26) is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Partial Motion for Summary Judgment (ECF No. 27) is DENIED.

IT IS FURTHER ORDERED that the parties submit a Proposed Joint Pretrial Order by August 31, 2018.

IT IS FURTHER ORDERED that the parties are referred to the Magistrate Judge for the purposes of scheduling a settlement conference.

DATED: July 10, 2018.



RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE